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QUESTIONS PRESENTED

1. Was the court of appeals below correct in holding that respondent's fee application under the Equal Access to Justice Act was timely, where the district court had remanded the case to the agency for further proceedings, resulting in an award of disability benefits to respondent, and respondent's fee application was filed prior to the district court's issuance of a post-remand judgment?

2. If not, should this Court's ruling be given prospective effect only because when respondent filed his fee application it was timely under all then-existing precedent and all of the agency's pronouncements on the subject?

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In The

Supreme Court of the United States

October Term, 1992

No. 92-311

DONNA E. SHALALA, Secretary of Health and Human Services,

Petitioner,

v.

RICHARD H. SCHAEFER,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR RESPONDENT

This case concerns the statute of limitations under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(B), which requires a party who has prevailed in litigation with the federal government to file an application for attorney's fees "within thirty days of final judgment in the action." Generally speaking, a prevailing party who has filed a timely application is entitled to a fee unless the government can show that its position in the case was "substantially justified." *Id.* § 2412(d)(1)(A). The specific issue here is whether, in a social security disability case remanded by the district court to the Social Security Administration for further proceedings under the fourth sentence of 42 U.S.C. § 405(g), a claimant may file an application for attorney's fees after a favorable conclusion of the remand proceedings, as the court of appeals held, or

whether every claimant who obtains a sentence-four remand must file a fee application shortly after the case is remanded, even before the claimant has prevailed, as the petitioner Secretary of Health and Human Services contends.

As we show below, the Eighth Circuit's decision, now joined by three other circuits, follows necessarily from the plain language of the EAJA. The Secretary's position, which has garnered very little support among the lower courts, is at odds not only with the EAJA's plain language, but also the Secretary's own previously announced policies. That position also makes no practical sense, since it would require claimants who obtain a remand to file fee applications with the district court that *always* would be premature, and would be superfluous in almost 40% of all cases sent back to the Agency, where the claimant fails to prevail on remand.

STATEMENT OF THE CASE

In June 1986, respondent Richard H. Schaefer filed an application for social security disability benefits under Title II of the Social Security Act, 42 U.S.C. § 401 *et seq.*, which was denied at the administrative level by petitioner Secretary of Health and Human Services (the "Secretary"). Respondent then sought review under 42 U.S.C. § 405(g) in the United States District Court for the District of Minnesota which, on April 5, 1989, reversed the Secretary's decision on various legal grounds, denied both parties' motions for summary judgment, and remanded for further administrative proceedings (Pet. App. 27a). The court did not at that time enter a separate judgment pursuant to Federal Rule of Civil Procedure 58.

Thereafter, pursuant to the district court's ruling, the Secretary considered the case anew, and, on January 31, 1990, an administrative law judge ("ALJ") found that respondent was disabled (Pet. App. 10a). When the Secretary's Appeals Council did not review that determination within the time allowed by law (*id.*), *see* 20 C.F.R. §§ 404.983, .984, the Secretary issued an award certificate to respondent (Pet. App. 10a). Shortly thereafter, respondent moved for entry of a final judgment in the district court and filed an EAJA application requesting

attorney's fees for 18.3 hours spent securing respondent's entitlement to benefits (*id.*).

The Secretary opposed the fee application as untimely under the EAJA's statute of limitations, 28 U.S.C. § 2412(d)(1)(B), because the application had not been filed within 30 days of the administrative decision on remand, as was required by the Ninth Circuit's decision in *Melkonyan v. Heckler*, 895 F.2d 556, 558 (1990). The magistrate rejected that position (Pet. App. 16a), on the ground that only a post-remand district court judgment could trigger the EAJA's statute of limitations, relying on this Court's decision in *Sullivan v. Hudson*, 490 U.S. 877 (1989), and Eighth Circuit precedent. The magistrate also found that the position of the United States had not been substantially justified (Pet. App. 17a) and recommended an award of fees under both the EAJA and 42 U.S.C. § 406(b)(1), which authorizes a fee to be paid out of the claimant's past-due benefits (Pet. App. 18a).

After the magistrate made his recommendation, this Court ruled in *Melkonyan v. Sullivan*, 111 S. Ct. 2157 (1991), that the EAJA's limitations period runs only from court judgments, not from the decisions of administrative agencies, thus repudiating the Ninth Circuit's view upon which the Secretary had relied. The Secretary then changed gears and argued to the district court that respondent's fee application should have been filed within 90 days of the issuance of the district court's remand order, *even though respondent had not won his claim for benefits at that point.* The Secretary noted that the EAJA's statute of limitations requires that fee applications be filed within 30 days of "final judgment in the action," 28 U.S.C. § 2412(d)(1)(B), and that "final judgment" is defined as a "judgment that is final and not appealable." *Id.* § 2412(d)(2)(G). Thus, the Secretary asserted, because an appeal against the government must be taken within 60 days of entry of judgment under Fed. R. App. P. 4(a), respondent's fee application was not timely because it had not been filed within 90 days of the district court's remand order.

In making this argument, the Secretary relied on dicta in this Court's decision in *Melkonyan*, which she maintained requires that the EAJA's statute of limitations be triggered

immediately in all cases remanded for further administrative proceedings under sentence four of 42 U.S.C. § 405(g), even though the claimant will not yet have prevailed at that point.

The district court rejected the Secretary's reading of *Melkonyan* (Pet. App. 9a), on the basis of the Eighth Circuit's then-recent decision in *Welter v. Sullivan*, 941 F.2d 674 (1991). *Welter* held that, in social security cases remanded under sentence four of § 405(g), a district court has jurisdiction under the EAJA to hold in abeyance its entry of a "final judgment" under 28 U.S.C. § 2412(d)(1)(B) until after the claimant prevails in the administrative remand proceedings. *Welter* relied on this Court's decision in *Hudson*, *supra*, 490 U.S. at 887, which had noted that claimants generally do not become prevailing parties until after the remand proceedings are completed (Pet. App. 12a).

The district court stated that, as was true in *Welter*, it had not entered a dispositive judgment in conjunction with its remand order, and that, therefore, the fee application was timely (*id.*). The district court also affirmed the magistrate's finding that the Secretary's position was unreasonable on the merits and awarded EAJA fees of $1,372.50 (Pet. App. 9a). The court ordered respondent's attorney to refund the EAJA fee to respondent, allowing the attorney to retain only the $2,287.50 contingent fee from respondent's back benefits (Pet. App. 9a). *See* Pub. L. No. 99-80, § 3 (1985), 99 Stat. 186 (28 U.S.C. § 2412 note) (requiring refund of smaller award to claimant).

On appeal, the Secretary abandoned the claim that her position had been substantially justified. While conceding that *Welter* controlled (Pet. App. 2a), the Secretary continued to maintain that *Melkonyan* rendered respondent's fee application untimely. The court of appeals affirmed on the basis of *Welter* (*id.*).

Before explaining why the court of appeals' decision was correct, two points deserve special emphasis. First, respondent's decision to seek fees only after the administrative proceedings on remand had been completed was fully consistent with — indeed *demanded by* — applicable law. *See, e.g., Gamber v. Bowen*, 823 F.2d 242, 244 (8th Cir. 1987); *Cook v. Heckler*, 751 F.2d 240, 241 (8th Cir. 1984); *accord Hudson*, 490 U.S. at 887. Moreover, the Secretary herself, through regulations and in litigation, had specifically endorsed that approach on a nationwide basis. *See Brown v. Sec'y of HHS*, 747 F.2d 878, 884 (3d Cir. 1984); 54 Fed. Reg. 37,789, 37,791 (1989).

Second, because prevailing social security disability claimants are generally quite poor and, if they prevail, will depend principally, if not exclusively, on their modest disability payments, the loss of an EAJA award will have a significant effect on those claimants' lives.[1] Here, for instance, because respondent's lawyer had been paid out of respondent's past-due benefits, he was legally obligated to return the EAJA award to his client, and so it is *respondent's* money, not his lawyer's, that is at stake. In short, a reversal here would diminish respondent's disability recovery, even though the Secretary's position on the merits was concededly unreasonable.

SUMMARY OF ARGUMENT

The EAJA's statute of limitations provides that a party seeking an award of fees and other expenses shall file a fee application "within thirty days of final judgment in the action . . . ." 28 U.S.C. § 2412(d)(1)(B). Construing these words most naturally, a case is not "final" for fees purposes until it can be determined whether the claimant has prevailed, which, in social security cases remanded to the Secretary for further proceedings, does not occur until *after* the results of those proceedings are known. Although *Sullivan v. Finkelstein*, 496 U.S. 617, 619 (1990), holds that the Secretary may appeal a social security case, such as this one, remanded under sentence-four of 42 U.S.C. § 405(g) as a "final decision" under 28 U.S.C. § 1291, that ruling does not govern the timing of fee applications under the EAJA, as this Court itself noted. *Finkelstein*, 496 U.S. at 628-30 & n.8; *see Hafner v. Sullivan*, 972 F.2d 249, 252 n.3 (8th Cir. 1992).

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[1] The average monthly social security disability payment in 1991 was $587. Social Security Admin., *Social Security Bulletin, Annual Statistical Supplement* 150, Table 5.A.1. (Dec. 1991).

The EAJA also requires that the fee application "show[ ] that the party is a prevailing party . . . [,]" 28 U.S.C. § 2412(d)(1)(B), an allegation that the claimant simply cannot make at the time the case is remanded for further proceedings. Indeed, between 30% and 40% of claimants *lose* on remand. By holding its judgment in abeyance until the post-remand proceedings were completed, the district court was able to effectuate the requirement that a fee applicant be a prevailing party at the time the application is filed. This also enabled the district court to effectuate this Court's decision in *Sullivan v. Hudson*, 490 U.S. 877 (1989), which held that social security claimants are eligible for EAJA fees for work done in post-remand proceedings.

Apart from the fact that it draws no support from the text of the EAJA, the Secretary's position would result in extraordinary inefficiencies. If the Secretary had her way, in *every* sentence-four case remanded for further proceedings, claimants would be required to file premature fee applications, even though many of those claimants will not even prevail in the post-remand proceedings. Thus, the plain terms of the EAJA and common sense require affirmance.

If, however, the Court reverses the Eighth Circuit's ruling, that decision should be applied prospectively only. *See Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). At the time that the Secretary says respondent should have filed his fee application, such a filing would have been considered premature under all then-existing precedent and the Secretary's own policies. Thus, retroactive application would be unfair to respondent and others similarly situated. *Id.* at 109.

ARGUMENT

I. THE EAJA'S STATUTE OF LIMITATIONS MAY ONLY BE TRIGGERED BY A DISTRICT COURT JUDGMENT ISSUED AFTER THE CLAIMANT HAS WON HIS OR HER CLAIM FOR BENEFITS.

A. Introduction

This case involves the interaction between the EAJA, 28 U.S.C. § 2412(d), and the jurisdictional provision of the Social

Security Act, 42 U.S.C. § 405(g), both of which require a brief introduction. The EAJA's statute of limitations provides that a party seeking an award of fees and other expenses shall, "within thirty days of final judgment in the action," submit to the court its fee application "which shows that the party is the prevailing party . . . ." 28 U.S.C. § 2412(d)(1)(B). Under the Social Security Act, a claimant dissatisfied with the Secretary's administrative decision on a claim for benefits under the Act may seek district court review under 42 U.S.C. § 405(g). Under sentence four of § 405(g), the court may reverse or modify the Secretary's decision, and remand to the Secretary for further proceedings. A remand under sentence four is appealable by the Secretary under 28 U.S.C. § 1291. *Sullivan v. Finkelstein*, 496 U.S. 617 (1990).

A social security case may also be remanded under sentence six of 42 U.S.C. § 405(g), but that may occur only in two rare instances: when the Secretary requests a remand prior to filing her answer, or when the court finds that there was good cause for the claimant's failure to produce newly-discovered, material evidence. *Finkelstein*, 496 U.S. at 626-27. The Secretary may not appeal a sentence-six remand, *id.*, which does not rule on the "correctness of the administrative determination." *Melkonyan v. Sullivan*, 111 S. Ct. 2157, 2163 (1991). The district court is obligated, under sentence seven of § 405(g), to review the post-remand administrative proceedings conducted pursuant to a sentence-six remand.

The court of appeals below held that the EAJA's limitations period should not be triggered simply by the district court's remand issued pursuant to sentence four of 42 U.S.C. § 405(g), because respondent had not established his entitlement to benefits at that point. The same result has been reached by three other courts of appeals.[2]

We acknowledge, however, that this Court's opinion in *Melkonyan v. Sullivan*, 111 S. Ct. 2157, has created considerable

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[2] *Gray v. Sec'y of HHS*, ___ F.2d ___, 1993 WL 5546 (9th Cir. Jan. 19, 1993); *Labrie v. Sec'y of HHS*, 976 F.2d 779 (1st Cir. 1992); *Gutierrez v. Sullivan*, 953 F.2d 579 (10th Cir. 1992), *cert. pending*, No. 92-361. *But see Luna v. Dep't of HHS*, 948 F.2d 169 (5th Cir. 1991).

confusion as to when an claimant who obtains a sentence-four remand must file his or her EAJA fee application. *Melkonyan* held that the term "final judgment" in the EAJA refers only to court orders and, therefore, decisions of administrative agencies may not trigger the limitations period. *Id.* at 2162. As to that holding there is no dispute. However, *Melkonyan* also suggested in dicta that a sentence-four remand, *when accompanied by a district court judgment*, may trigger the limitations period:

> In sentence-four cases, the filing period begins after the final judgment ("affirming, modifying or reversing") is entered by the district court and the appeal period has run, so that the judgment is no longer appealable. See [28 U.S.C.] § 2412(d)(2)(G).

Id. at 2165. In our view, nothing in *Melkonyan*'s dicta requires that a district court enter judgment simultaneous with its issuance of its sentence-four remand, in cases where the claimant's entitlement to benefits has yet to be determined. Moreover, even if the *Melkonyan* dicta were read to require that the district court enter a final judgment each time it issues a sentence-four remand, and that such a judgment trigger the limitations period, that dicta should be abandoned because it conflicts with the EAJA.

Seeking to capitalize on the *Melkonyan* dicta, the Secretary relies almost exclusively on 42 U.S.C. § 405(g), the statute that establishes the district court's jurisdiction over the merits of social security claims, to support her claim that EAJA applications in cases remanded under sentence four of § 405(g) must be filed shortly after the remand order is entered. But this case concerns the triggering of the *EAJA's* statute of limitations, not § 405(g), and, thus, the *only* question in this case is Congress' intent in drafting the EAJA's statute of limitations. As we now show, a review of the relevant provisions makes clear that Congress did not intend that a fee application be filed before the party seeking the fee has prevailed, which is the Secretary's position here.

B. The EAJA's Plain Terms Require Affirmance.

Under 28 U.S.C. § 2412(d)(1)(B), a fee application shall be filed "within thirty days of final judgment in the action."

Construing these words most naturally, a case is not "final" for fees purposes until it can be determined whether the claimant has prevailed. As we have noted, *Finkelstein* holds that a sentence-four remand is final for purposes of appeal by the government, but it should not govern the timing of fee applications by the claimant under the EAJA, as this Court itself indicated in *Finkelstein*. 496 U.S. at 628-30 & n.8; *see Hafner v. Sullivan*, 972 F.2d 249, 252 n.3 (8th Cir. 1992) ("As a matter of statutory construction and common sense, we see no reason why an appealable 'final judgment' under § 405(g) must necessarily be a 'final judgment' for purposes of § 2412(d)(1)(B)"). Because "finality" for fees purposes always requires that the applicant has prevailed, *Farrar v. Hobby*, 113 S. Ct. 566, 573 (1993), by using the term "final judgment" in the EAJA, Congress intended that any EAJA application be filed after the claimant has succeeded in his or her claims for benefits. *Accord* H.R. Rep. No. 120, pt. 1, 99th Cong., 1st Sess. 19 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 148 (where social security case is remanded for further proceedings, limitations period commences only after claimant prevails and district court enters post-remand judgment); *see Sullivan v. Hudson*, 490 U.S. 877, 887 (1989).

Other portions of the section containing the EAJA's statute of limitations also make abundantly clear that Congress intended fee applications to be filed only after the applicant has prevailed. Most importantly, 28 U.S.C. § 2412(d)(1)(B) requires that the application "show[ ] that the party is a prevailing party . . . ." Under prevailing party jurisprudence generally, a litigant has not prevailed simply by obtaining a favorable legal ruling. *Hewitt v. Helm*, 482 U.S. 755, 760-62 (1987). Thus, in the Social Security context, the claimant has not prevailed merely by obtaining a sentence-four remand. *Hudson*, 490 U.S. at 887. Rather, a claimant must obtain a finding of disability on remand in order to meet the prevailing party requirement, and cannot possibly make the showing required by the statute until that has occurred. Thus, Congress plainly contemplated that *any* party applying for an EAJA fee already would have already established his or her entitlement to the monetary benefits sought in the complaint. *See id.*; *see also White v. New Hampshire Dep't of Employment Security*, 455 U.S.

445, 452 (1982) (question of attorney's fees is "inquiry that cannot even commence until one party has 'prevailed' "). Indeed, it is not at all clear that a claimant ethically can make the necessary prevailing party allegation in a fee application filed before the remand proceedings take place, *i.e.*, when there is no arguable basis for maintaining that the claimant has won. *Cf.* Fed. R. Civ. P. 11.

The Secretary's response to the EAJA's requirement that the fee applicant "show that [he or she] is a prevailing party" is, at best, a non-sequitur. After having argued at length that a litigant may only prevail when he or she obtains an award of benefits (Sec'y Br. 25-27), the Secretary shifts ground, in an effort to explain away the statute's plain terms, and argues that a statement in the fee application that the claimant has obtained a remand is enough, for the meantime, to be deserving of prevailing party status under § 2412(d)(1)(B)(Sec'y Br. 28). Later, according to the Secretary, if the claimant *truly* prevails, "he will have satisfied the remaining element that is necessary for *full* prevailing party status" (*id.*) (emphasis added).

The notion of "partial" and "full" prevailing party status has no legal basis under any fee-shifting legislation, let alone the EAJA. In short, the Secretary's formulation does not, to put it most generously, comport with "the ordinary meaning of the words used" by Congress when it determined that the fee application must "show" that the applicant has prevailed. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). Furthermore, in roughly 30% to 40% of all cases remanded to the Secretary by the district courts, claimants do *not* prevail on remand. *See* Social Security Admin., *Annual Report to Congress* 38 (Apr. 1992) (footnote to chart entitled "Civil Litigation in FY 1991"). Thus, under the Secretary's theory, a claimant can claim "partial" prevailing party status in a fee application filed with the district court, knowing that such status could be "lost" because of the claimant's failure, in fact, to prevail. To state such a fictional scenario is to refute it, and to belie any notion that Congress intended it.

The EAJA's further requirement that the applicant "allege that the position of the United States is not substantially justified[,]" 28 U.S.C. § 2412(d)(1)(B), also confirms that Congress

intended that the application be filed, if at all, after the claim to benefits has been fully resolved. As this Court has put it, "[t]he 'substantial justification' requirement of the EAJA establishes a clear threshold for determining a *prevailing party's* eligibility for fees . . . ." *Comm'r, INS v. Jean*, 496 U.S. 154, 165 (1990) (emphasis added). Thus, while the government can, in some cases, lose on the merits and still show that its position was reasonable, *Pierce v. Underwood,* 487 U.S. 552, 565 (1987), a finding that the government was unreasonable *presupposes* that the claimant has prevailed. Put another way, the issue in the EAJA portion of a social security case will be whether the "position of the United States" that the claimant was not disabled *was* a reasonable one. It defies reason to suggest, as does the Secretary (Sec'y Br. 28), that the substantial justification dispute should be joined prior to a determination as to whether the claimant is in fact disabled. While it is true that the substantial justification finding must be based on the record already made, *see* 28 U.S.C. § 2412(d)(2)(D), the necessary relationship between the prevailing party and substantial justification requirements underscores, once again, that Congress did not intend a filing at the time the Secretary contends is required.

C. The Decision of the Court of Appeals Makes Practical Sense.

The Eighth Circuit's decision here was based on its eminently reasonable prior ruling in *Welter v. Sullivan*, 941 F.2d 674 (1991), which fully considered *Melkonyan*. *Welter* held that the district court's sentence-four *remand* did not constitute the sentence-four *judgment*, because the district court intended to retain jurisdiction and issue its judgment after the remand proceedings had been completed (Pet. App. 5a-6a).[3]

Here, the district court did not issue a *judgment* when it ordered a remand, realizing that it ought to retain jurisdiction until after it was determined whether the claimant had prevailed, as *Sullivan v. Hudson* holds is appropriate. 490 U.S. at

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[3] The Eighth Circuit has reaffirmed *Welter* in *Hafner v. Sullivan*, 972 F.2d 249 (1992).

886-87. Rather, it simply remanded the case under sentence four of 42 U.S.C. § 405(g), but postponed entry of its judgment, and thus the running of the EAJA's statute of limitations, until after the administrative proceedings were completed. This is fully consistent with *Melkonyan*, which noted that, in order to trigger the statute of limitations, there must be a judgment "accompany[ing]" the post-remand order. 111 S. Ct. at 2165. Here, there was no judgment "accompanying" that order prior to the completion of the post-remand proceedings. *Accord Mendez v. Sullivan*, 792 F. Supp. 375, 378 (E.D. Pa. 1992).

By holding its judgment in abeyance until the post-remand proceedings were completed, the district court was able to effectuate *Hudson* — which held that claimants are eligible for EAJA fees for work done in post-remand proceedings. 490 U.S. 877. In other words, the court could determine whether the claimant had prevailed and, if so, whether he or she was entitled to fees for the post-remand proceedings. *See* Part I. D, *infra* (discussing post-remand *Hudson* fees in further detail); *accord Hafner*, 972 F.2d at 251. By contrast, the rule suggested by the Secretary makes no sense. In this case, for instance, the Secretary complains that respondent's EAJA application was filed more than a year after the district court's remand order (Sec'y Br. 18-19). But it is inconceivable that the claimant could have done anything else but wait for the completion of the post-remand proceedings, since he had not yet prevailed, at least as the law stood at that time, because he had not yet been awarded any benefits. *See Hudson*, 490 U.S. at 887 (citing circuit precedent, including from Eighth Circuit).[4]

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[4] We believe that the Eighth Circuit's ruling is consistent with the EAJA, prevailing party jurisprudence, and common sense. However, as we explained in our Opposition (at 14-18), if the *Melkonyan* dicta does in fact require the limitations period to be triggered by the remand order, the only sensible reading of *Melkonyan* is that achieving a sentence-four remand itself renders the claimant a prevailing party under EAJA, as a number of district court opinions have held in response to *Melkonyan*. *See, e.g., Thomas for Brown v. Sullivan*, 785 F. Supp. 788, 792 (C.D. Ill. 1992); *Rollins v. Sullivan*, 784 F. Supp. 253, 254, 258 (E.D. Pa. 1992); *Spurlock v. Sullivan*, 783 F. Supp. 474, 479 (N.D. Cal.), *reaff'd*, 790 F. Supp. 979 (N.D. Cal. 1992); *Mills v. Sullivan*, 782 F. Supp. 1347, 1349 (W.D. Mo. 1992); *Sesker v. Sullivan*, 779 F. Supp. (continued...)

Although the Secretary agrees that respondent had not prevailed at that point (Sec'y Br. 15-16), she argues, nevertheless, that the statute of limitations began to run when the remand order was entered. Thus, in the Secretary's view, respondent should have filed a "protective" EAJA application after the case was remanded and then awaited the completion of administrative proceedings. Then, when respondent prevailed on remand, the court could award attorney's fees (presumably after reviewing the remand proceedings). To put it bluntly, this scheme is absurd and, not surprisingly, finds very little support in the post-*Melkonyan* case law.[5]

When considered in the context of the thousands of social security cases filed every year, the Secretary's "file early and often" position would be unbelievably wasteful. It would require that, in *every* sentence-four case remanded for further proceedings, the claimant file a fee application before he or she knew the results of the post-remand proceedings. Courts would thus be inundated with fee applications, even though many of these claimants will not even prevail in the post-remand proceedings. If the claimant loses on remand before the Agency, there might be further judicial review of the merits of the action, and thus the fee application might never, or only well into the future, be considered. "Thus, the Secretary's position would require the claimant to file an anticipatory EAJA petition at a time when it either must be denied or indefinitely suspended — the ultimate in laying traps for the unwary and senselessly cluttering court dockets." *Hafner*, 972 F.2d at 251.

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[4](...continued)
1042, 1044 (W.D. Mo. 1991); *Audette v. Sec'y of HHS*, 776 F. Supp. 84, 91 (D.R.I. 1991); *Dow v. Sullivan*, 774 F. Supp. 46, 48-49 (D. Me. 1991).

[5] The Secretary claims support for the Agency's position in *Luna v. Dep't of HHS*, 948 F.2d 169 (5th Cir. 1991), which did hold that a sentence-four remand triggers the limitations period. *See also Bertrand v. Sullivan*, 976 F.2d 977 (5th Cir. 1992). However, these issues are pending before the Fifth Circuit in *Lidy v. Sullivan*, No. 92-1035, in which, incredibly, the Secretary is taking a position at odds with the one taken here and in *Luna*, but consistent with the decision below — *i.e.*, that a remand reversing the Secretary's decision on an issue of law does *not* trigger the limitations period. Brief for Appellee [Secretary], at 5-7, No. 92-1035 (5th Cir. filed Apr. 15, 1992).

This cluttering of dockets is not mere conjecture because of the relationship of two factors. First, there is large volume of EAJA filings because attorneys whose clients have won sentence-four remands have an ethical obligation to file an EAJA application, if they believe there is a colorable claim that the government's position on the merits was not substantially justified. *See Taylor v. Heckler*, 608 F. Supp. 1255, 1259-61 (D.N.J. 1985). Generally speaking, under 42 U.S.C. § 406(b)(1), attorneys are entitled to a fee from their clients' benefits, not to exceed 25% of the past-due amount, under a contingent-fee arrangement in which the Secretary acts as the collection agent. *See Bowen v. Galbreath*, 485 U.S. 74 (1988). In this case, for instance, respondent's attorney was paid a contingent fee of $2,287.50 from respondent's past-due benefits (Pet. App. 9a). That attorney was also required to file an EAJA application in order to protect as much of the claimant's benefits as possible, because, if the EAJA fee were awarded, he would be required to return the smaller of the two fees to the claimant, as was ordered by the district court here (*id.*). *See* Pub. L. No. 99-80, § 3 (1985), 99 Stat. 186 (28 U.S.C. § 2412 note).[6]

Second, the Secretary's insistence that an application must be filed prior to achieving prevailing party status, when combined with the strong ethical duty to seek EAJA fees, will result in hundreds of superfluous applications each year. In 1990 alone, 4,343 cases were remanded by the district courts for further administrative proceedings. *See Annual Report to Congress, supra*, at 38. In 38%, or 1,950 of those 4,343 cases, the claimant lost on remand, *id.*, which would make the EAJA

[6] No past due benefits may be withheld from claimants who prevail on SSI claims under Title XVI of the Social Security Act, 42 U.S.C. § 1381, *et seq.*, which is a disability and retirement program for poor people not entitled to regular social security benefits. *Bowen v. Galbreath*, 485 U.S. 74 (1988). For those cases, which constitute about 19% of all federal court Social Security Act cases, *see Annual Report to Congress, supra*, at 38, the EAJA provides the only significant inducement for legal representation. *See Galbreath*, 485 U.S. at 77 (citing "extreme financial need of SSI beneficiaries"). *See* Brief of *Amici Curiae* Legal Services of Northern California, Inc., *et al.* (hereafter "LSNC Br.") 28-30.

filing demanded by the Secretary in those cases utterly meaningless.

Nor should this Court underestimate the actual burden on the fee applicant and the court system that each such superfluous filing entails. An adequate EAJA application includes, at a minimum, the claimant's attorney's detailed contemporaneous time records, *see* 28 U.S.C. § 2412(d)(1)(B), an explanation of the compensable expenses incurred, *id.* § 2412(d)(2)(A), evidence of the relevant increase in the cost of living to establish the hourly rate requested, *id.*, evidence that the claimant is eligible for a fee under the EAJA's net worth limitation, *id.* § 2412(d)(2)(B), and a comprehensive brief explaining why the Secretary's administrative and litigation conduct was not substantially justified. *Id.* § 2412(d)(1)(B). The Secretary, of course, will be obligated to respond to these pleadings if she wishes to avoid fee liability, because she has the burden of proving substantial justification. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10-11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4989.

In practice, the Secretary not infrequently concedes a lack of substantial justification and EAJA claims are thus settled, sometimes before the application is filed. *Cf.* Admin. Office of the U.S. Courts, *1991 Annual Report of the Director* 121, Table 25 (over 92% of EAJA applications against Secretary granted). Such early settlements will not take place under the procedure demanded by the Secretary here because, at the time the claimant must file the fee application, the Secretary is still contesting the claimant's entitlement to benefits. And any eventual settlement would cost the Agency *more* under the Secretary's proposal, since the claimant would be entitled to a fee for preparing the "protective" application. *See Comm'r v. Jean*, 496 U.S. 154.

This insistence on the filing of a premature, potentially meaningless fee application is rendered all the more irrational by the fact that, if the claimant does prevail, a subsequent fee request will invariably be necessary. As we explain in more detail below (*infra* at 18-22), under *Sullivan v. Hudson*, 490 U.S. 877, a claimant is entitled to fees for work in post-remand administrative proceedings and, therefore, the claimant would need to update the application to add information about time

and expenses incurred on remand after prevailing before the Secretary. This two-tiered filing system is itself at odds with the EAJA's plain terms, which speak of "*an* application for fees," 28 U.S.C. § 2412(d)(1)(B) (emphasis added), not a protective application and then a final application. *See also Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation").

Equally important, as we have noted (*see supra* at 14), attorneys are entitled to a contingent fee paid from the claimant's past-due benefits under 42 U.S.C. § 406(b)(1), which cannot, by definition, be calculated until the past-due benefits are known. That does not occur until after the remand proceedings are completed, and the Secretary has made the extremely complex calculations necessary to determine the past-due benefits. *See* 20 C.F.R. §§ 404.401 *et seq.*, 404.1918. Here, for instance, respondent received his past-due award letter, and then filed for fees under both § 406(b) and EAJA about a month later (Pet. App. 15a). But, according to the Secretary, respondent should have filed for EAJA fees well before he prevailed, although he could not have filed for § 406(b) fees until much later. Indeed, given the delays in administrative remand proceedings, the time between the two filings will generally be a year or more. *See Fergason v. Sullivan*, 771 F. Supp. 1008, 1013 (W.D. Mo. 1991) (average time between remand and final administrative decision on remand 13.9 months).

The Secretary maintains that the earlier, possibly superfluous EAJA filing is necessary so that EAJA claims are made "prompt[ly]" (Sec'y Br. 29). But that point is plainly specious, because, as the Secretary concedes (*id.* at 27), the court will be forced to wait until the administrative proceedings are over before it can determine whether the claimant has prevailed. Moreover, in the typical case, the court should, for efficiency purposes, consider the EAJA and § 406(b) applications at the same time so that it can calculate the set-off required by Pub L. 99-80, § 3, and direct that the claimant be refunded the lesser of the two awards. Thus, the premature filing of EAJA applications in sentence-four remand cases demanded by the Secretary would not further any legitimate governmental or judicial interest. To the contrary, because the government's filing

deadline is inconsistent with prevailing party jurisprudence, it will catch many claimants unaware. Such a result is at odds with Congress' stated desire that the term "final judgment" in the EAJA's statute of limitations should not be construed in an "overly technical" manner "as a trap for the unwary." *See* H.R. Rep. No. 120, pt. 2, 99th Cong., 1st Sess. 6 n.26 (1985), *reprinted in* 1985 U.S.C.C.A.N. 156 n.26.

The government cites two concerns of its own, which add no force to its argument and actually underscore the strengths of respondent's position. First, the Secretary criticizes the Eighth Circuit's requirement that the claimant "report" the remand results to the court in order to seek a fee, or that the Secretary do so if she wants to trigger the limitations period. *See* Sec'y Br. 29. This criticism is more than a little ironic, since, under the Secretary's view of the EAJA, either the claimant or the government obviously would be required to "report" the remand results to the court, because there would be no other way to obtain a fee.

The Secretary also complains that the Eighth Circuit's rule promotes delay (Sec'y Br. 29), presumably because the limitations period could only be triggered by a post-remand judgment. As a practical matter, of course, the claimant will return to the district court promptly, "being hungry to see some cash," *McDonald v. Schweiker*, 726 F.2d 311, 314 (7th Cir. 1983), and we note that the government has never claimed that EAJA applications have been delayed as a general matter. The only real difference between the rules urged by the parties is that, under the government's view, voluminous fee applications will be pending for months, if not years, for no reason, and in fact may languish forever in cases in which the claimant does not prevail on remand.

However, even assuming that the potential for delay is a serious consideration, the *government's* procedure allows *more* opportunity for delay. Under it, there is no time by which the claimant must report to the court after winning on remand, because a "timely" fee application would have already been filed many months before the remand proceedings were completed. Indeed, the government could not even cut off the claimant's opportunity for a fee by obtaining a judgment, as it

clearly could after the post-remand decision under the Eighth Circuit's ruling. *See Tripodi v. Heckler*, 100 F.R.D. 736, 739 (E.D.N.Y. 1984). Thus, under the Secretary's approach, the claimant could wait forever after winning on remand and the Secretary would be helpless to create a time bar, except possibly by laches. *Id.; see White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445, 451 n.13 (1974) (*citing Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939), where passage of several years between completion of merits and fee request "presented no bar to an award of fees").

In light of these serious practical considerations, absent clear statutory language mandating the result urged by the Secretary, the Court should not assume that Congress created such a preposterous scheme. Not only is that language lacking here, but there is, as we have noted, very strong evidence that Congress envisioned that fee applications would be filed only after the post-remand proceedings were completed, precisely as the Eighth Circuit held here. Thus, all doubts should be resolved against the Secretary's interpretation of the EAJA.

D. The Court of Appeals' Decision is Consistent with this Court's Decision in *Sullivan v. Hudson*, which the Secretary's Position Here Virtually Overrules.

In *Sullivan v. Hudson*, this Court held that work performed in post-remand administrative proceedings in social security cases is compensable under the EAJA because that work is necessary to the vindication of the claimant's rights. 490 U.S. at 885-90. In *Hudson*, the district court's remand did not occur because the Secretary requested a remand prior to filing her answer or because the district court found "good cause" for the taking of newly discovered "material" evidence (the only predicates for a sentence-six remand, the other type of remand under § 405(g)). Rather, the decision was reversed and remanded because the Secretary had ignored her own regulations and had failed to consider the cumulative effect of the claimant's disabilities (*id.* at 880-81) — a quintessential fourth-sentence remand. *See Labrie v. Sec'y of HHS*, 976 F.2d 779, 783 (1st Cir. 1992) (Secretary concedes *Hudson* involved sentence-four remand); Sec'y Br. 24 (same).

Despite the fact that *Hudson* was remanded under sentence four, this Court specifically noted that the district court had entered a post-remand judgment of dismissal. 490 U.S. at 881-82. The claimant then filed a fee application, which no one even intimated was untimely (even though it would have been under the government's latest theory), and this Court affirmed an award of fees, both for in-court work and for counsel's time before the Secretary on remand. With respect to the latter component, this Court held that the post-remand work was compensable because it was necessary "to the ultimate vindication of the claimant's rights . . .[,]" *id.* at 890, and repeatedly noted the district court's ability to retain jurisdiction in order to protect those rights. *Id.* at 886.

Thus, *Hudson* seeks to provide a fully compensatory fee when the Secretary's unreasonable conduct requires a claimant to endure further administrative proceedings. With that in mind, the Secretary's principal motivation in arguing that *Finkelstein* and *Melkonyan* prevent the district court from issuing a post-remand judgment in sentence-four cases is, in our view, clear. The Secretary believes that the court may not retain jurisdiction even to issue a post-remand judgment and, therefore, the claimant is not eligible for fees for post-remand work established by this Court in *Hudson* (Sec'y Br. 25). In other words, the Secretary maintains that *Hudson* fees are not available in sentence-four cases (*id.*). This argument turns *Hudson* on its head.

As we have explained, the rationale of *Hudson* is that representation in post-remand proceedings is necessary to the vindication of the claimant's rights under the Social Security Act. 490 U.S. at 890. Indeed, *Hudson* noted that, without the opportunity for such fees, some attorneys might abandon claimants once the court remanded the case. *Id.* Although most attorneys would not forsake their clients in light of their ethical responsibilities and the opportunity for a contingent fee under 42 U.S.C. § 406(b), *Hudson* recognized that *claimants* would be severely penalized if they could not recover EAJA fees for the post-remand administrative proceedings, because their lawyers would then be compensated solely out of the claimants' benefits. As the Court put it, "we find it difficult to ascribe to

Congress an intent to throw the Social Security claimant a lifeline it knew was a foot short." 490 U.S. at 890.

Given the logic of this Court's decision, there is no reason to believe that *Hudson* should apply only in sentence-six cases, *i.e.*, remands occurring prior to the Secretary's answer or because there is new and material evidence. Each of *Hudson*'s key rationales — the relationship between the remanding court and the administrative remand proceedings, the encouragement of representation, and the protection of the claimant's benefits through recovery of a full fee — apply with equal force in sentence-four and sentence-six cases.

Indeed, if anything, recovery of administrative remand fees makes *more* sense in many sentence-four cases. A court that orders a sentence-six remand "does not in any way rule as to the correctness of the administrative determination." *Melkonyan*, 111 S. Ct. at 2163. Frequently, a sentence-six remand occurs because the claimant wants to present information to the ALJ of which neither the claimant nor the Secretary was even aware when the Secretary's original decision was made. *Finkelstein*, 496 U.S. at 626. Thus, in many of those cases, the need for further administrative proceedings is not the Secretary's fault.

In a sentence-four case, however, a court's decision to reverse or modify the Secretary's decision *always* signifies that the Secretary has committed a legal error. In *Finkelstein*, for example, the sentence-four remand was part and parcel of the district court's effective invalidation of a federal regulation concerning eligibility for survivors' benefits. 496 U.S. at 624. Here, the district court's remand was necessary, among other things, to comply with the Eighth Circuit's controlling law on the evaluation of pain, which the ALJ's decision had violated (Pet App. 36a). Thus, here, as in any case remanded under sentence four, the court sent the case back to the Secretary with instructions to follow the legal precepts that she had previously breached, something which never occurs in a sentence-six case. In short, the fact that the claimant is required to endure the time and expense of further administrative proceedings in a sentence-four case results from the Secretary's wrongful acts,

and thus compensation for that time and expense precisely fulfills *Hudson*'s purposes.

The degree to which the Secretary's argument vitiates *Hudson* should not be underestimated. Although to our knowledge the Secretary does not keep statistics on how many cases are remanded under sentence four as opposed to sentence six, experience suggests that the vast majority of cases remanded under § 405(g) are remanded under sentence four. Sentence six is employed only in the rare instances that the Secretary agrees to a remand prior to answering the complaint or when the court finds that there is new and material evidence that, for good cause, was not produced previously. All other remand cases — virtually every case involving an erroneous administrative ruling by the Secretary — are sentence-four remands. *See Melkonyan*, 111 S. Ct. at 2164 (explaining narrow scope of sentence six). Based on our informal review of social security decisions, and undersigned counsel's experience, we estimate that more than 90% of all § 405(g) remands are under sentence four. *See also* LSNC Br. 23.

Moreover, the relatively few sentence-six cases that do exist are less likely than sentence-four cases to generate significant *Hudson* fees. First, as we have indicated, in sentence-six cases where the case is sent back to the Agency to consider newly discovered evidence, it is quite possible that the Secretary's position was reasonable, *i.e.*, substantially justified. Further, where the Secretary agrees to a remand prior to filing her answer, there will be very little attorney time expended at the district court level and it is at least possible, if not likely, that the Secretary's request for a remand was precipitated by a desire to settle the case on terms favorable to the claimant, so that the total compensable fee will be negligible. In short, the Secretary's position here would effectively overrule *Hudson*, in the guise of a technical statute of limitations ruling.

To be sure, despite the Secretary's insistence to the contrary, *Hudson* could be protected in sentence-four cases even if the Secretary's proposed filing deadline is adopted here. While that result would be preferable to the virtual annulment of *Hudson* that the Secretary has advanced, an explanation of how such a scheme would work serves only to further undermine the

Secretary's statute of limitations argument. Under the Secretary's view, the claimant would file his or her fee application, complete with time records, brief, and other necessary materials, shortly after the issuance of the sentence-four remand, and the Secretary would then respond. At that point, the court would hold the matter in abeyance indefinitely.

Thereafter, if the result on remand were favorable, the claimant would have to update the fee application, submitting evidence of the time and expenses incurred in the administrative proceedings (along with revised information on the relevant increase in the cost of living under 28 U.S.C. § 2412(d)(2)(A)). The claimant likely would want to present new argument on the "substantial justification" question, if the favorable decision on remand presented particularly cogent reasons for abandoning the Secretary's prior position (for instance, the ALJ may have embraced precisely the theory of disability argued by the claimant from the case's inception).

In short, a two-step filing requirement to preserve *Hudson* fees has no more support in the language, history, or purpose of the EAJA, than does the Secretary's position on the underlying statute of limitations question. This Court should thus reject that position and the Secretary's not-so-subtle invitation to eviscerate *Hudson*.

E. The Court of Appeals' Decision is Consistent with *Melkonyan*, *Finkelstein*, and Rule 58 of the Federal Rules of Civil Procedure.

As we noted at the outset of this brief, the Secretary's position in this case rests not on the terms of the EAJA, but on her reading of *Sullivan v. Finkelstein* and *Melkonyan v. Sullivan*. For the following reasons, the court of appeals' decision is consistent with those cases, and is reinforced by Rule 58 of the Federal Rules of Civil Procedure.

1. In *Melkonyan*, the Court noted that "[i]n sentence four cases, the filing period begins after the final judgment ('affirming, modifying, or reversing') is entered by the court and the appeal period has run, so that the judgment is no longer appealable. See [28 U.S.C.] § 2412(d)(2)(G)." 111 S. Ct. at 2165. This Court's discussion of sentence-four cases was dicta,

however, because the parties had agreed, and the Court concurred, that Mr. Melkonyan's case had not been remanded under that sentence. *Id.* at 2163.

In evaluating the *Melkonyan* dicta, we must be careful to remember that it is the EAJA's limitations period, not § 405(g), that must be interpreted in this case. That provision states that a fee application is due "within thirty days of final judgment in the action . . . ." 28 U.S.C. § 2412(d)(1)(B). "Final judgment," in turn, is defined by the EAJA as "a judgment that is final and not appealable . . . ." *Id.* § 2412(d)(2)(G). Thus, under this section, as well as under the above-quoted *Melkonyan* dicta, the proper focus is on *when* a district court's judgment is no longer appealable. The answer to that question is contained in Rule 58 of the Federal Rules of Civil Procedure, as confirmed by Rule 4 of the Federal Rules of Appellate Procedure, which governs the time period for filing appeals from final decisions of the district courts.

Rule 58 provides in relevant part that "[e]very judgment *shall* be set forth in a separate document. A judgment is effective *only* when so set forth and when entered as provided in Rule 79(a)" (emphasis added).[7] Rule 4(a)(1) of the Federal Rules of Appellate Procedure establishes that, in cases in which the federal government is a party, either party has 60 days from entry of the judgment or order in which to file an appeal. Significantly, Rule 4(a)(7) states that "[a] judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79 of the Federal Rules of Civil Procedure." If there were any doubt that the requirement of Rules 58 is absolute, this Court has made clear that the Rule "must be mechanically applied in order to avoid . . . uncertainties as to the date on which judgment is entered." *U.S. v. Indrelunas*, 411 U.S. 216, 222 (1973).

Rule 4(a) thus confirms what the plain language of Rule 58 establishes — that in order to trigger the 60-day time period of Rule 4(a)(1), there is an absolute requirement that a document,

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[7] Rule 79(a) prescribes, among other things, the manner in which the Clerk must enter a judgment on the civil docket.

separate from the appealable order, be entered on the district court docket. It is undisputed that no judgment at all, let alone such a separate document, was entered here, and thus, in the words of EAJA § 2412(d)(2)(G) and *Melkonyan*, there exists no appropriate judgment that is final and *not appealable*. The district court's decision here — to hold its final judgment in abeyance until the court was notified of the result of the administrative proceedings — thus avoids the statute of limitations bar, and the absurdities that bar would create if claimants were required to file fee applications before they prevail on remand.

2. Moreover, the court of appeals' view is fully consistent with *Finkelstein*, 496 U.S. 617. The narrow ruling in *Finkelstein* — that a district court order remanding a case under the fourth sentence of the Social Security Act's jurisdictional provision, 42 U.S.C. § 405(g), is a "final decision" for purposes of appeal by the government under 28 U.S.C. § 1291 — does not speak to, let alone disturb, the deeply embedded understanding that, for attorney's fees purposes, a case is not final until the party seeking a fee has prevailed.

In *Finkelstein*, the claimant was a widow whom the Secretary had found not disabled under a regulation that requires individuals seeking disabled widows' benefits to have a so-called "listed impairment" as defined by the Secretary. *See* 20 C.F.R. Part 404, Subpart P, Appendix I (listing of specific medical conditions entitling an applicant to a finding of disability without further inquiry). The enabling legislation, however, required a finding of disability if the claimant is precluded "from engaging in any gainful activity." 42 U.S.C. § 423(d)(2)(B)(1989). The district court agreed with the Secretary that the claimant did not have a listed impairment, but nevertheless remanded the case for further findings as to her ability to engage in gainful activity, thus "essentially invalidat[ing], as inconsistent with the Social Security Act, the Secretary's regulation restricting" the benefits to those with a listed impairment. *Finkelstein*, 496 U.S. at 624. Rather than accept the remand, the Secretary sought an immediate appeal of this important issue of law, but the Third Circuit dismissed the appeal on the ground that the remand order was an interlocutory, non-appealable order under 28 U.S.C. § 1291.

The two most prominent features of the *Finkelstein* decision are its confined scope and its practical approach to the problem of obtaining appellate review of the particular type of district court order at issue there. Thus, the opinion begins by cautioning that it only addresses whether certain § 405(g) remand orders, not all remand orders, or even other orders under § 405(g), are appealable by the Secretary. *Finkelstein*, 496 U.S. at 623 & n.3. Moreover, the Court recognized that, if the Secretary issued a decision favorable to the claimant on remand, there might be no way for the Secretary to appeal the important adverse ruling of law included in the district court's decision. *Id.* at 625 ("there would be grave doubt . . . whether he could appeal his own order").

Textual support for the decision in *Finkelstein* came from the fourth sentence of § 405(g), which provides that the district court, in reviewing final administrative decisions of the Secretary, may enter a "judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). The use of the term "judgment," when coupled with the eighth sentence's declaration that such judgments "of the court shall be final," convinced the Court that "sentence four" judgments, including those ordering a remand, are appealable by the government under § 1291. *Finkelstein*, 496 U.S. at 625.

We agree with the court of appeals that the remand order here was issued under sentence four, and we believe that all sentence-four remand orders, such as the one issued here by the district court, are appealable by the Secretary under 28 U.S.C. § 1291. In other words, under *Finkelstein*, such orders are final as they apply to the Secretary within the meaning of sentence eight of 42 U.S.C. § 405(g), and thus may be appealed by the Secretary. *See Finkelstein*, 496 U.S. at 625. Moreover, we acknowledge, as the Secretary notes (Sec'y Br. 16 n.9), that simply because the district court here did not label its remand order a "judgment" does not mean that its order was not one under sentence-four, of which the Secretary may obtain appellate review, once a Rule 58 separate judgment is issued. *See Finkelstein*, 496 U.S. at 628 n.7.

Further, under *Finkelstein*, once a case is remanded under sentence four, the district court cedes most of its jurisdiction over the merits of the claim, at least temporarily, while the post-remand administrative proceedings are being conducted. *Id.* at 625. If the claimant does not win on remand, or achieves only partial success, *Finkelstein* indicates that the claimant must initiate a "separate piece of litigation," *id.*, in order to gain further merits review.[8]

Respondent and the Secretary agree on the foregoing discussion of *Finkelstein*, and thus the Secretary is simply wrong that respondent's position would "obliterate th[e] carefully drawn distinction between sentence four and sentence six remands" (Sec'y Br. 20). But those points of agreement do not resolve *this* case. Thus, that a sentence-four remand is appealable by the Secretary under § 1291, has no bearing on when a judgment is final and not appealable under the EAJA. Indeed, the Secretary's prominent reliance on *Finkelstein*'s § 405(g) jurisprudence illustrates precisely where its analysis has gone awry.

Finkelstein concerned whether *the Secretary* could appeal a sentence-four remand order, and insures that review is available to the Secretary under 28 U.S.C. § 1291, but does not address the district court's obligation to issue a judgment that triggers the appeal period, and certainly does not address whether such a judgment would trigger the EAJA's limitations period. In short, the sentence-four remand order is significant only because it constitutes a final decision that the government may

[8] *Finkelstein* does *not* require that a claimant who has failed to win on remand actually file a new civil action under sentence one of § 405(g) in order to obtain further merits review, rather than simply moving the district court to reopen the prior civil action. The latter resolution would make eminent sense, since the claimant would not be required to draft another complaint, pay another filing fee, and serve process again, the case would be returned to a judge or magistrate who is already familiar with the record, and the claimant would be assured that the case would not go to the bottom of the docket pile. All of these problems would arise if a new civil action were filed, which would make little sense since the "new piece of litigation" referred to in *Finkelstein* is the same case that was originally filed in the district court. *See* LSNC Br. 26-28.

appeal under § 1291, and it does not, standing alone, constitute a judgment within the meaning of Fed. R. Civ. P. 58 or Fed. R. App. P. 4(a). It does not, therefore, trigger the EAJA's limitations period, which is specifically dependent on the issuance of a Rule 58 judgment. *See McDonald v. Schweiker*, 726 F.2d 311, 313 (7th Cir. 1983) ("final judgment" is used 151 times in U.S. Code, with varying meanings).

Further, *Finkelstein* was very careful to limit its holding to appeals taken by *the Secretary*, as opposed to *the claimant*. 496 U.S. at 619, 623. The Court expressly reserved the question of whether "the person seeking judicial review may seek to appeal [a remand judgment] on the ground that broader relief should have been granted by the district court . . . ." *Id.* at 623 n.3. In doing so, the Court cited *Bohms v. Gardner*, 381 F.2d 283 (8th Cir. 1987), *cert. denied*, 390 U.S. 964 (1968), where a claimant sought review in the court of appeals of a § 405(g) remand. The district court had remanded the case for further proceedings because the Secretary's original administrative decision had contained numerous legal errors. *Id.* at 284. In an opinion by then-Circuit Judge Blackmun, the Eighth Circuit held that a claimant may *not* appeal a § 405(g) remand, because such a remand does not finally end the case.

There is good reason to distinguish between governmental and claimant appeals under § 405(g). When the district court remands a case for further proceedings under sentence four and the Secretary finds the claimant disabled on remand, it is unlikely that the government would be able to appeal its own decision, thus possibly insulating the district court's legal ruling from appellate review. As we have noted, *Finkelstein* specifically cited this problem as support for its ruling. 496 U.S. at 625. A claimant, however, has no such problem, since he or she clearly can obtain further review of any adverse decision after remand. *See supra* note 8. Thus, as it applies to *a claimant*, a sentence-four remand is truly interlocutory — it arrives before the claimant's entitlement to benefits is established *and* it does not cut off his or her right to further review. As this Court has indicated on more than one occasion, "the requirement of finality [under § 1291] is to be given a 'practical rather than a technical construction.' " *Eisen v. Carlisle & Jacquelin*, 417 U.S.

156, 171 (1974) (*quoting Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949)). This functional approach counsels against the claimant's right to appeal a sentence-four remand prior to the remand proceedings, since it would promote piecemeal review, with no countervailing benefit. *See Eisen*, 417 U.S. at 171 (*citing Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950)).

That *Finkelstein* does not establish the claimant's right to appeal a sentence-four remand is important here, because the EAJA permits only *claimants*, not the government, to seek fees, *see* 28 U.S.C. § 2412(d)(1)(A), and an EAJA "final judgment" is one that is "final and not appealable . . . ." *Id.* § 2412(d)(2)(G). If, as we maintain, a sentence-four remand for further proceedings is not appealable by a claimant, it clearly is not "final" under the EAJA. Indeed, the case would be "not appealable," and the limitations period would be triggered, only after the post-remand proceedings were resolved in the claimant's favor and the district court had issued a post-remand judgment of dismissal — precisely the procedure contemplated by the courts below.

3. The court of appeals' ruling is thus consistent with *Melkonyan, Finkelstein*, and the federal rules. In effect, the Eighth Circuit decision permits the district courts to hold its EAJA (*i.e.*, Rule 58) judgment in abeyance until it can be determined whether the claimant has prevailed, and avoids the filing of always premature, and frequently meaningless, EAJA applications. This ruling, now joined by three other circuits, in no way conflicts with the Secretary's opportunity for appellate review established in *Finkelstein*, which can be harmonized with the EAJA's statute of limitations in three different ways.

First, since *Finkelstein* guarantees the government the right to appeal a sentence-four remand, there is no harm in waiting until the benefits determination on remand is known, at which time a judgment can be issued, at the behest of either party, that would trigger both the EAJA filing period and the time period in which to take the appeal. The Secretary now claims that this request for a post-remand judgment is burdensome, but it is exactly what the government had been doing for the entire history of the Social Security Act, and what it told this

Court it would continue to do for fees purposes in *Finkelstein*. Secretary's Brief at 44 n.35, *Sullivan v. Finkelstein*, 496 U.S. 617 (No. 89-504).

Second, when the Secretary wishes to appeal a district court sentence-four remand order, a very rare occurrence in routine disability cases such as respondent's, the district court can issue a judgment after the filing of the Notice of Appeal, thus facilitating appellate review. *Cf.* Fed. R. App. P. 4(a)(2) (premature notice of appeal cured by subsequent entry of judgment).

Finally, if the Court believes that *Finkelstein* and *Melkonyan* require the district court to issue a Rule 58 judgment simultaneous with the issuance of every sentence-four remand order, which would trigger the time in which the Secretary has to appeal the merits, still that would not trigger the EAJA filing deadline. As we have explained (*supra* at 27-28), since that judgment does not activate the *claimant's* appeal deadline, it has no possible bearing on the running of the EAJA's statute of limitations. Moreover, the Secretary is simply wrong that the district court is without jurisdiction to enter a subsequent judgment that would trigger the fees filing deadline.

Assuming that the district court is divested of all of its jurisdiction on the merits when the court issues a remand for further proceedings under sentence four, the district court clearly retains jurisdiction to entertain the fee dispute. Indeed, under the Secretary's formulation, the claimant must invoke the court's jurisdiction by filing his or her application within 90 days of the sentence-four remand, wait until the results of the administrative hearing, and, if the result is favorable, then notify the court of the result.

Thereafter, the district court also has jurisdiction to award a fee in a case remanded under sentence four, and to issue a *judgment* on that award. Presumably, in the unlikely event that there is a dispute as to meaning of the fee award or as to payment, the district court could surely issue a further *judgment* clarifying or enforcing its prior orders. Our point here is only that the district court plainly has the power to act and to issue judgments, even after it has issued an appealable order (as they often do in contempt and enforcement proceedings *and* in

attorney fees proceedings). *See White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445, 451-52 & n.14 (1974); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988). Thus, *Finkelstein*, at most, temporarily cuts off the district court's jurisdiction in sentence-four remand cases on the underlying disability dispute.

Despite this considerable reservoir of jurisdiction that exists after the issuance of a sentence-four remand, the Secretary argues that the district court may not issue a post-remand judgment of the type that respondent asked for here. The Secretary does not explain why that is so, and as we demonstrated in Part I. A *supra*, Congress clearly contemplated the issuance of such a judgment. Indeed, prevailing party jurisprudence — which requires a material alteration in the relationship between the parties before a fee can be assessed — requires that an *enforceable judgment* post-date, or coincide with, the attainment of prevailing party status. *See Farrar*, 113 S. Ct. at 573. Under *Finkelstein*, that judgment would not further adjudicate the merits of the claimant's disability in sentence-four cases, but it would serve two critical purposes: the claimant would have an order to enforce his or her right to benefits established in the remand proceedings, *accord Farrar*, 113 S. Ct. at 573, and there would be a clear point for the running of the EAJA's filing deadline.

4. Even if this Court were to agree with the Secretary that a Rule 58 judgment must be issued at the same time as the sentence-four remand order, *and* that judgment triggers the EAJA's limitations period, that result would not make *respondent's* fee application untimely. As the Secretary concedes (Sec'y Br. 19 n.12), the district court here did not issue a separate judgment within the meaning of Rule 58 and, therefore, the filing period did not run with the entry of the remand order.

The Secretary's only response to this irrefutable point is that respondent waived the need for a Rule 58 judgment because he did not insist upon the issuance of a separate judgment after the district court issued its sentence-four remand (Sec'y Br. 19 n.12). This argument borders on the frivolous. Respondent did not request the issuance of a Rule 58 judgment because he did not seek to appeal the remand order and he did

not need a judgment in order to participate in the post-remand proceedings. Indeed, any request for a judgment and an award of attorney's fees at that time would have been met with the response required both in the Eighth Circuit and around the country — that such a request was premature. *See Hudson*, 490 U.S. at 887 (citing Eighth Circuit precedent). Quite plainly, it was up to the *Secretary*, not respondent, to try cut off respondent's EAJA rights by requesting issuance of a judgment.

Moreover, the case law is quite clear that, without the issuance of a Rule 58 judgment, an appeal filed more than 60 days after the entry of an appealable order, is premature, not untimely. *See, e.g., Indrelunas*, 411 U.S. at 219 (government's appeal timely almost two years after entry of appealable jury verdict); *Cloyd v. Richardson*, 510 F.2d 485 (6th Cir. 1975). Indeed, if failing to request entry of a final judgment constituted "waiver" of the literal terms of Rule 58, that Rule would be made meaningless, because, in virtually every case in which there was an appealable order, but no judgment, the party hoping to obtain a dismissal on the ground that the appeal was untimely could argue successfully that the separate judgment requirement had been "waived."

For all these reasons, respondent's fee application was timely and the decision of the court of appeals should be affirmed.

II. IF THIS COURT CONCURS WITH THE SECRETARY'S STATUTE OF LIMITATIONS ARGUMENT, THAT RULING SHOULD NOT BE APPLIED IN THIS CASE.

Even if this Court agrees with the Secretary's interpretation of the EAJA's statute of limitations, the Court's ruling should not be applied to respondent, under either the non-retroactivity doctrine established in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), or under principles of equitable tolling. Respondent spent three and one-half years opposing the Secretary's concededly unreasonable resistance to his disability claim. Thereafter, respondent filed an application for less than $1,700 in attorney's fees at a point considered timely under all then-existing precedent and the Secretary's own policies, but he has been forced to litigate the timeliness issue all the way to this

Court. As respondent now shows, if there were ever a case in which these equitable doctrines ought to be applied to cushion the harshness of an unanticipated ruling, this is it.

1. Under *Chevron Oil*, 404 U.S. 97, a court may give prospective effect only to decisions that establish new rules of law or overrule clear past precedent, because retroactive application would be inequitable to the party before the court and others similarly situated. A review of the proceedings below and the relevant legal landscape show that retroactive application of a rule allowing a sentence-four remand to trigger the EAJA's limitations period "would be anomalous indeed." *Id.* at 107.

The district court's remand order was issued on April 4, 1989 (Pet. App. 26a). Ninety days later, or July 3, 1989 — the date by which the Secretary claims respondent should have filed his fee application — was less than a month after this Court's June 12, 1989 decision in *Hudson*, which made clear that fee applications should post-date the administrative decision on remand. 490 U.S. at 887.

On January 31, 1990, an ALJ found respondent to be disabled, and the Appeals Council did not review that ruling (Pet. App. 10a). An award certificate, determining the amount of benefits due respondent, was issued on June 12, 1990 (*id.*). Shortly thereafter, on July 17, 1990, respondent moved for entry of a final judgment and filed his EAJA application (*id.*). At no time prior to that point did the legal terrain portend that a sentence-four remand issued before a finding of disability could possibly trigger the filing deadline.. The law nationwide, including in the Eighth Circuit, was that the fee application could only be filed after the remand proceedings had been completed. *See, e.g., Gamber v. Bowen*, 823 F.2d 242, 244 (8th Cir. 1987); *see also Brown v. Sec'y of HHS*, 747 F.2d 878, 884 (3rd Cir. 1984) (in EAJA case, court relied on the Secretary's promise that the Agency would, as a matter of policy, "return to the district court and file a copy of the government's decision upon conclusion of *any* remand proceeding in which a claimant receives benefits") (emphasis in original).

The Secretary's position also remained constant, recognizing that the law required the government, "at least for purposes of

awarding attorney's fees" under the EAJA, to return to the district court, for a post-remand judgment to trigger the EAJA's filing period. Secretary's Reply Brief at 12, *Sullivan v. Hudson*, 490 U.S. 877 (No. 88-616). Even in *Finkelstein* — where the Secretary argued in favor of exactly the sentence-four/sentence-six distinction that she now claims mandates a reversal here, and which post-dated *Hudson* by about a year — the government remained true to its prior position:

> Of course, it is appropriate for the Secretary to file *any* new decision awarding benefits with the court so that the court can consider whether attorney's fees should be awarded under the EAJA.

Secretary's Brief at 44 n.35, *Sullivan v. Finkelstein*, 496 U.S. 617 (No. 89-504) (emphasis added). It was not until *Melkonyan* was decided on June 10, 1991 that anyone could have conceivably thought — based on *Melkonyan*'s sentence-four dicta — that a fee application in a sentence-four case had to be filed shortly after the remand.

Elsewhere the Secretary has taken, and still takes, the position that a Social Security claimant has the absolute right after the post-remand decision to return to the district court on the merits and therefore, presumably, for attorney's fees as well. 54 Fed. Reg. 37,789, 37,791 (1989). Furthermore, the forms *currently* used by the Secretary to inform claimants of ALJ decisions on remand tell claimants that they have the right to return to the district court and that "we will forward a copy of the decision, and a transcript of the record in your case to the United States Attorney for filing with the court" (*infra* App. 2a).[9]

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[9] Responding in part to these misleading forms, the Secretary assured this Court in *Melkonyan* that the Agency's practices would be changed to conform to the Court's decision, which was issued on June 10, 1991. Secretary's Brief at 31 n.26, *Melkonyan v. Sullivan*, 111 S. Ct. 2157 (No. 90-5538). However, the form contained in the appendix hereto was issued on May 29, 1992 to a claimant who had won a sentence-four remand. Moreover, on January 15, 1993, the Secretary's Office of Civil Actions sent respondent copies of the same forms attached to petitioner's brief in *Melkonyan* (which contain the (continued...)

With this background in mind, we turn to the first of three *Chevron Oil* factors — whether the decision below established a new principle of law, either because it overruled clear past precedent or because it decided an issue of first impression the resolution of which was not clearly foreshadowed. 404 U.S. at 107. In applying this factor, we look to the law at the time that the underlying conduct, or the failure to act, took place. *Id.* at 106-09. There can be no question that, when the relevant event took place approximately two years before *Melkonyan* was decided — when respondent "failed" in 1989 to divine the need to file his fee petition within 90 days of the issuance of the sentence-four remand — the law unequivocally required the Secretary to return to the district court *after* remand to report the results of the proceeding, and thereby either continue or dismiss the pending civil action. Under the EAJA, it was equally clear that a final judgment from the district court after remand was necessary to trigger the 30-day limitations period, as the Secretary expressly told this Court in *Finkelstein*, and as the Court itself had indicated in *Hudson*. 490 U.S. at 887.

But perhaps the best evidence that, in July 1989, just after *Hudson* was decided, respondent could not have foreseen the necessity of filing his fee application *before he won his right to benefits* is the experience of social security claimants and their attorneys generally. The voluminous number of EAJA cases leading up the grant of certiorari here, reveal dozens, if not hundreds, of fee applicants caught unaware by the Secretary's new-found timeliness argument, and we know of none who anticipated it. The very fact that the government changed its own arguments *in this case* in mid-streám — at first adopting the Ninth Circuit's ruling in *Melkonyan*, and then moving to its current position — speaks volumes as to whether its stance was foreshadowed. Thus, a reversal of the decision below would establish a new principle of law, "by overruling clear past

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[9](...continued)
same offending language as is quoted in the text), *see* Petitioner's Brief at 2a, 4a, *Melkonyan v. Sullivan*, 111 S. Ct. 2157 (No. 90-5538), and informed respondent that those forms are the ones currently in use.

precedent on which litigants may have relied." *Chevron Oil*, 404 U.S. at 106.

Next, given the prior history of the 30-day rule and its purpose and effect, retroactive application of a new rule would plainly retard the purposes of the law. *Id.* at 106-07. In short, retroactive application would be inconsistent with the basic purpose of the EAJA: to make the government bear the expense of its unreasonable conduct. *Comm'r v. Jean*, 496 U.S. at 162-65 & nn.11-14. Further, retroactive application would be the very "trap for the unwary resulting in the unwarranted denial of fees" that Congress sought to eliminate in its 1985 EAJA amendments. H.R. Rep. No. 120, pt. 2, *supra* at 6 n.26.

Finally, retroactive application would produce substantially inequitable results, *Chevron Oil*, 404 U.S. at 107, as the facts of this case illustrate. Petitioner's counsel below, a small firm practitioner in Anoka, Minnesota, took this case on a contingent fee basis. After pursuing his client's claim for several years, and after the Secretary failed to file the administrative decision with the district court, counsel moved for entry of a final judgment and EAJA fees at a point considered timely under a settled nationwide practice. To deny respondent the right to recoup the fee that he has already paid his attorney "would surely be inimical to the beneficent purpose of the Congress." *Chevron Oil*, 404 U.S. at 108.

In addition, retroactive application also would be unjust to hundreds of other claimants and their lawyers who would suffer from reversal here. Attorneys with pending EAJA applications relied on settled law and should not be penalized for doing so. More fundamentally, claimants would be damaged severely because, although their attorneys could still obtain a fee in many cases, such as this one, from *the claimants'* past-due benefits under 42 U.S.C. § 406(b)(1), a reversal here would, if applied retroactively, negate any possibility of an EAJA fee, thus forcing claimants to suffer substantial losses of needed disability benefits. *See Watson v. Sullivan*, 735 F. Supp. 971 (D. Ore. 1990) (government urges retroactive application of Ninth Circuit's ruling in *Melkonyan* that would result in loss of more than $7,000 in past-due benefits). As Judge Pollak has put it, "it is difficult to believe that . . . the Supreme Court would have

ordered retroactive application of its newly announced rule [in *Melkonyan*], because such a decision would have left without a remedy a large number of Social Security claimants who had relied on existing law." *Rollins v. Sullivan*, 784 F. Supp. 253, 258 (E.D. Pa. 1992) (footnote omitted).

Thus, if this Court reverses, it should give its ruling prospective effect only because, as in *Chevron Oil*, the "equities require[] nonretroactive application of the . . . statute of limitations here." 404 U.S. at 109.[10]

2. Aside from whether *Chevron Oil* requires prospective-only application, the filing period should be equitably tolled, as it was in *Luna v. Dep't of HHS*, 948 F.2d 169, 172-73 (5th Cir. 1991). Noting that *Luna* tolled the limitations period because the district court's remand order purported to retain jurisdiction, the Secretary argues that this case is not comparable (Sec'y Br. 21 n.14). While we agree with the Secretary that *Luna*'s tolling analysis incorrectly focussed on § 405(g) rather that the EAJA's statute of limitations (*id.*), the situation here is factually quite similar to *Luna*. Since the district court here did not enter judgment, but simply denied *both* parties' motions

[10] The majority of courts that have considered the issue have applied *Melkonyan*'s sentence-four dicta prospectively only. *See, e.g., Sargent v. Sullivan*, 1991 WL 160091 (4th Cir. Aug. 22, 1991) (unpublished); *DeFrancesco v. Sullivan*, 803 F. Supp. 1332, 1335-36 (N.D. Ill. 1992) (noting near-universal rejection of Secretary's approach, and refusing to apply it retroactively); *Carrol v. Sullivan*, 802 F. Supp. 295, 300-04 & n.6 (C.D. Cal. 1992) (noting that "clear majority" of courts have refused to apply Secretary's interpretation retroactively) (alternative holding); *Lindner v. Sullivan*, 799 F. Supp. 888, 891 (N.D. Ill. 1992); *Mendez v. Sullivan*, 792 F. Supp. 375, 378 n.2 (E.D. Pa. 1992) (alternative holding); *Green v. Sullivan*, 788 F. Supp. 275, 276-78 (W.D. Va. 1992); *Sansano v. Sullivan*, 788 F. Supp. 218, 222-25 (D.N.J. 1992); *Bacon v. Sec'y of HHS*, 786 F. Supp. 434, 438-41 (D.N.J. 1992); *Thomas for Brown*, 785 F. Supp. at 791-93; *Rollins*, 784 F. Supp. at 256-58; *Lopez v. Sullivan*, 780 F. Supp. 496, 504 (N.D. Ill. 1991); *Santiago v. Sullivan*, 783 F. Supp. 223, 225-26 (E.D. Pa. 1992); *Sykes v. Sullivan*, 779 F. Supp. 29, 31 (E.D. Pa. 1991); *Butts v. Bowen*, 775 F. Supp. 1167, 1171-72 (N.D. Ill.), *reaff'd*, 778 F. Supp. 453, 453-54 (N.D. Ill. 1981); *see also Myers v. Sullivan*, 916 F.2d 659, 677-78, 679 n.20 (11th Cir. 1990) (assuming correctness of Secretary's posision, while noting its inconsistency with *Hudson*, and holding *Finkelstein* should not be applied retroactively to EAJA timeliness issues).

for summary judgment (Pet. App. 27a), the court evinced an obvious intent to retain jurisdiction (which made sense, since that was the law at the time the district court's remand order was issued), which is sufficient to toll the limitations period.[11]

But it is the *Secretary's* actions that are most troubling. The government promised in *Brown*, *supra*, that it would return to the court in *every* remanded case for entry of judgment, so that EAJA applications could be considered in an orderly fashion. The Secretary issued regulatory commentary to the same effect. 54 Fed. Reg. at 37,791 (claimants have absolute right to return to court after administrative decision on remand); *see also infra* App. 2a. It defies reason to suggest, as the Secretary does here, that respondent should be denied a fee after having taken actions that conform precisely with the Agency's own directives. As this Court has put it, equitable tolling is appropriate where "the complainant has been induced . . . by his adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Veterans Admin.*, 111 S. Ct. 453, 458 (1990). Here, where the Secretary has repeatedly promised to return to the district court after the entry of *any* post-remand order to allow the filing of fee applications, as well as to permit further review on the merits, there is more than sufficient reason to toll the statute of limitations.[12]

3. Not surprisingly, the Secretary's brief avoids any discussion of the fairness of holding respondent to a time limit

[11] Indeed, contrary to her statement here, the Secretary conceded in her court of appeals brief that the district court evinced an intent to retain jurisdiction. Reply Br. for Appellant [Secretary] at 4, No. 91-3494MNST (8th Cir. filed Mar. 24, 1992).

[12] *See also Bodner v. Sullivan*, 804 F. Supp. 23, 33 (N.D. Cal. 1992) (concurring with decision below, but ruling alternatively on tolling grounds); *Boronat v. Sullivan*, 788 F. Supp. 557, 561 (S.D. Fla. 1992) (equitable tolling); *Misciagno v. Sec'y of HHS*, 786 F. Supp. 1120, 1126 (E.D.N.Y. 1992) (relieving claimant from sentence-four judgment on account of surprise, inadvertence, or excusable neglect); *Ground v. Sullivan*, 785 F. Supp. 1407, 1410 & nn.2 & 3 (S.D. Cal. 1992) (declaring prior judgment null and void, thus establishing timeliness of claimant's application); *Robinson v. Sullivan*, 783 F. Supp. 245, 248 (E.D.N.C. 1991).

neither the Secretary nor any private party could have predicted, and instead presents a grab-bag of arguments as to why respondent's equitable arguments should not be reached. None of those arguments has merit.

First, the Secretary complains that respondent did not raise the *Chevron Oil* or tolling arguments in the court of appeals (Sec'y Br. 21 n.14, 30 n.18). Respondent can hardly be faulted for that supposed failure, since at the time he filed his appellate brief, the Eighth Circuit had decided *Welter v. Sullivan*, 941 F.2d 674, which even the Secretary conceded was controlling and would require a ruling in respondent's favor. *See* Reply Br. for Appellant [Secretary], at 2, No. 91-3494MNST (8th Cir. filed Mar. 24, 1992); Pet. App. 2a (noting Secretary's concession). In addition, both the *Chevron Oil* and equitable tolling arguments were briefed extensively by *amicus* Mid-Minnesota Legal Assistance, whose appearance for the purpose of addressing those issues was specifically consented to by the Secretary, *see* Consent to Mem. in Support of Motion to File Brief as Amicus Curiae, No. 91-3494MNST (8th Cir. filed Feb. 21, 1992), and the Secretary replied at length to those arguments. *See* Reply Br. for Appellant [Secretary], at 8-18, No. 91-3494MNST (8th Cir. filed Mar. 24, 1992). In light of these facts, the Secretary's waiver argument is fanciful at best.

Next, the Secretary maintains that the 30-day filing period is a jurisdictional bar, like the one present in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379-80 (1981), which precludes the Court from considering a non-retroactive ruling. To the contrary, the provision here, 28 U.S.C. § 2412(d)(1)(B), is not jurisdictional; it is worded virtually identically to 42 U.S.C. § 2000e-16(c), the statute of limitations considered in *Irwin v. Veterans Admin.*, 111 S. Ct. 453. There, the Court held, as a general matter, that once Congress has waived the government's immunity, equitable principles apply to the same extent as in a suit among private parties, and that, therefore, statutes of limitations in actions against the government are not jurisdictional. *Id.* at 457. Accordingly, because the EAJA is a waiver of the federal government's immunity to fees and litigation expenses, its 30-day filing period is not jurisdictional, and ordinary retroactivity principles control.[13]

We expect the Secretary to rely on what it has termed "legislative history" that indicates that the 30-day period is jurisdictional. The committee report cited by the Secretary below, however, S. Rep. No. 856, 98th Cong., 2d Sess. 16 (1984), was prepared for a version of the EAJA that was *vetoed* by the President. *Cf. Finkelstein*, 496 U.S. at 631 (Scalia, J., concurring). The inherent unreliability of such a report is underscored here because there is much more in-depth legislative history accompanying the bill that actually became law that *excludes* the earlier language concerning the purportedly jurisdictional nature of the limitations period. *See* H.R. Rep. No. 120, pt. 1, *supra* at 19-20; H.R. Rep. No. 120, pt. 2, *supra*, at 6 & n.26. It would have been anomalous for Congress to have made the filing deadline strictly jurisdictional, while at the same time urging that it not be construed in an "overly technical" manner as a "trap for the unwary," *id.*, which succinctly describes the snare that has been set for claimants by the Secretary's filing deadline. In any event, a snippet in a committee report — even it had accompanied the bill that was enacted — cannot overcome this Court's decision in *Irwin*. *See West Virginia University Hospitals v. Casey*, 111 S. Ct. 1138, 1147 (1991).

We also expect the Secretary to argue, as she did below, that *Chevron Oil* analysis may not be conducted because, under the patchwork decision in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), a ruling concerning the filing of fee applications in sentence-four cases cannot be applied prospectively here, if had already been applied retroactively in *Melkonyan*. 111 S. Ct. at 2448 (opinion of Souter, J.) (referring to requirement of "pure prospectivity"). However, the rule at issue here — the timing of fee applications in sentence-four remand cases — was not applied in *Melkonyan*, as both the

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[13] *See Bacon*, 786 F. Supp. at 438 (EAJA's filing period not jurisdictional under *Irwin*); *Golbach v. Sullivan*, 779 F. Supp. 9, 11-12 (N.D.N.Y. 1991) (same); *see also Sansano*, 788 F. Supp. at 225 (rejecting Secretary's reliance on *Firestone*); *Rollins*, 784 F. Supp. at 256 (same).

parties and the Court agreed that the case there did not involve a sentence-four remand. 111 S. Ct. at 2163. *See, e.g., DeFrancesco v. Sullivan*, 803 F. Supp. 1332, 1335 n.4 (N.D. Ill. 1992) (*Beam* does not bar non-retroactive application); *Rollins*, 784 F. Supp. at 257-58 (same); *see also* Supplemental Report and Recommendation re Motion for Fees Under the EAJA (July 13, 1992), *Melkonyan v. Dep't of HHS*, No. CV-4317-MRP(K)(on remand from this Court: finding that case had been remanded under sentence six).[14]

The Secretary further maintains that respondent's equitable arguments should be ignored because the statute of limitations question here will affect only a diminishing number of cases that is dwindling out as the decision in *Melkonyan* becomes more distant in time. That is incorrect on its own terms because, if the Secretary prevails here, hundreds, if not thousands, of post-*Melkonyan* applicants would be trapped by the new ruling in the great majority of jurisdictions that have refused to accept the Secretary's interpretation of *Melkonyan*. In any event, the Secretary's position would render non-retroactivity analysis meaningless, since in any case where prospective-only application is urged, once the new rule is established, only those who had reason to follow the old rule will be caught unaware, a class which, by definition, will diminish over time.

Finally, the Secretary maintains that this Court should remand the retroactivity issue to the Eighth Circuit if it is worthy of consideration. While this would still allow respondent the opportunity to obtain the fée he deserves, it would also require further delay and is wholly unnecessary in light of the full discussion of the relevant legal principles here. Moreover,

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[14] *Beam* does not have any bearing on respondent's equitable tolling claim. Moreover, because *Beam* did not reach any true consensus (the "pure prospectivity" holding is gleaned from the widely disparate rationales of five Justices, in three entirely separate opinions), the full reach of *Beam* is unclear. *See DeFrancesco*, 803 F. Supp. at 1335 n.4. This is especially true here, because in the Term prior to *Beam*, eight members of this Court indicated that *Chevron Oil* applied fully to the proposed non-retroactive application of statutes of limitations. *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 178 (1990) (plurality opinion); *id.* at 221-23 (dissenting opinion of Stevens, J.).

the suggestion of a remand is at odds with *Beam*, whose "*pure* prospectivity" can be better achieved by a Supreme Court decision rather than a decision of a regional court of appeals.

* * *

The foregoing discussion amply demonstrates the unfairness of holding respondent to a statute of limitations that was unfathomable at the time he filed his fee application. However, the Court can properly avoid reaching respondent's equitable claims, by rejecting outright the Secretary's interpretation of the EAJA's statute of limitations, which has no basis in the statute, and would lead to the filing of premature and meaningless fee applications, a result that Congress did not intend.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 18, 1993

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

SSN: [omitted]

[Claimaint's name
[and address omitted]

Date mailed: MAY 29 1992

[Attorney's name
[and address omitted]

NOTICE OF ADMINISTRATIVE
LAW JUDGE DECISION
PLEASE READ CAREFULLY

Enclosed is the Administrative Law Judge's decision on your claim. This notice gives you information about what you can do if you disagree with the decision. Please read this notice and the decision carefully.

If You Disagree With The Decision

If you disagree with the Administrative Law Judge's decision, you may appeal to the Appeals Council. You must do this by filing written exceptions. Exceptions are your statements explaining why you disagree with the decision of the Administrative Law Judge.

- Mail the written statement of your exceptions to the Appeals Council, Office of Hearings and Appeals, P.0. Box 3200, Arlington, VA 22203.
- You must file your written exceptions **within 30 days** from the date you receive this notice. The Appeals Council will assume that you received the notice within five days after the date at the top of this notice unless you show you did not receive it within the five-day period.
- If you need more time to file your written exceptions, you must file a written request for additional time with the Appeals Council within 30 days of the date you receive this

notice. If you request more than a 30-day extension of time, you must explain why you need the extra time.

- Please **include the Social Security number(s)** shown on the decision on any paper you send to the Appeals Council.
- The Appeals Council will consider your exceptions and the parts of the decision you think are wrong. The Appeals Council may also consider those parts which you think are correct.
- If the Appeals Council concludes that further action is necessary, it will either return your case to an Administrative Law Judge for further action or issue a decision.
- If the Appeals Council issues a decision, its decision may be either more or less favorable to you than the decision of the Administrative Law Judge.
- If the Appeals Council concludes that the decision of the Administrative Law Judge is correct, it will notify you in writing why your exceptions do not warrant a change in the decision of the Administrative Law Judge.
- If you submit written exceptions and the Appeals Council does not change the decision of the Administrative Law Judge, that decision becomes the final decision of the Secretary after remand.

You Do Not File Written Exceptions

Even if you do not file exceptions, the Appeals Council may review your case on its own motion (within 60 days from the date this notice was mailed). The Appeals Council will notify you if it decides to do so and will advise you what action it proposes to take.

If the Appeals Council does not review the decision on its own motion and you do not file exceptions, we will forward a copy of the decision, and a transcript of the record in your case to the United States Attorney for filing with the court. You have the right to pursue your civil action with the court.

New Application

You have the right to file a new application at any time, but filing a new application is not the same as filing exceptions to this decision. You might lose benefits if you file a new application instead of filing written exceptions to this decision. Therefore, if you think this decision is wrong, you should file your exceptions within 30 days.

If you have any questions, please contact your local Social Security office. If you visit, please bring this notice and decision with you.

Replaces Form HA-L99-U6